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**J & R Flooring, Inc. d/b/a J. Picini Flooring¹ and
Freeman's Carpet Service, Inc. and FCS Floor-
ing, Inc.**

**Flooring Solutions of Nevada, Inc., d/b/a FSI and In-
ternational Union of Painters and Allied Trades,
District Council 15.** Cases 28-CA-21229, 28-CA-
21230, 28-CA-21231, and 28-CA-21233

October 22, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,
PEARCE, AND HAYES

I. INTRODUCTION

Section 10(c) of the National Labor Relations Act authorizes the Board to issue an order requiring a party who has engaged in an unfair labor practice to “take such affirmative action . . . as will effectuate the policies of th[e] Act.” The remedial power vested in the Board by this provision is a “broad, discretionary one,” *NLRB v. J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (internal quotation mark and citation omitted), and has long been understood to include the authority to order respondents to post notices to employees concerning the violations found by the Board, the remedies ordered, and the underlying rights of the employees. See *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438 (1941). In exercising its discretion, the Board, like all administrative agencies, has a duty to adapt its rules and policies to the demands of changing circumstances. See, e.g., *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975) (“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board”).

In this case, we consider whether employers and unions that are found to have violated the Act should be required to distribute remedial notices electronically, such as by email and/or posting on an intranet or the internet, in addition to the traditional posting of a paper notice on a bulletin board. We find that given the increasing prevalence of electronic communications at and away from the workplace, respondents in Board cases should be required to distribute remedial notices elec-

tronically when that is a customary means of communicating with employees or members. We modify the Board’s current notice-posting language, which requires posting in all places where notices to employees or members are customarily posted, to expressly encompass electronic communication formats.

II. BACKGROUND

On May 14, 2010, the Board issued a notice and invitation to file briefs to the parties and interested amici in this and two other cases, *Stevens Creek Chrysler Jeep Dodge, Inc.*, Case 20-CA-33367 et al., and *Arkema, Inc.*, Case 16-RD-1583. The notice requested that the parties address whether Board ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceeding any necessary factual showing should be required.² Briefs in response to the Board’s invitation were filed by the General Counsel; Respondent FSI, Inc.; Respondent Arkema, Inc.; the Charging Parties in *Stevens Creek Chrysler Jeep Dodge* (Machinists District Lodge 190, Machinists Automotive Local 1101, and International Association of Machinists and Aerospace Workers, AFL-CIO) together with the Charging Party in the instant case, International Union of Painters and Allied Trades, District Council 15; and amici AFL-CIO, Service Employees International Union (SEIU), National Right to Work Foundation, Chamber of Commerce of the United States (joined by Respondent J & R Flooring, Inc.), Bodman LLP, and Texas Association of Business.³

III. POSITION OF THE PARTIES AND AMICI

The General Counsel, the Charging Parties, and amici AFL-CIO and SEIU make the following arguments. In light of the increasing reliance on electronic communication in the workplace, the Board should amend its standard notice posting provision, which requires posting of remedial notices in all places where notices to employees

¹ On January 4, 2008, the Board granted the Charging Party Union’s motion to sever Case 28-CA-21226, involving Respondent *Custom Floors, Inc.*, from this proceeding and to remand it to the Regional Director to dismiss the complaint in that case pursuant to a non-Board settlement. The caption has been modified accordingly.

² On September 5, 2007, Administrative Law Judge Lana H. Parke issued her decision in the above entitled proceeding. The Charging Party filed exceptions and a supporting brief, and the Respondents filed answering briefs. The Charging Party excepted to, inter alia, the judge’s failure to order electronic posting of a remedial notice to employees. On August 26, 2010, the Board issued a decision and order affirming in part and reversing in part the judge’s findings, and severing the electronic notice posting issue for decision at a later date. 355 NLRB No. 123 (2010).

³ By order dated June 17, 2010, the Board invited responsive briefing from the parties. Respondent Arkema and Charging Parties Machinists District Lodge 190, Machinists Automotive Local 1101, International Association of Machinists and Aerospace Workers, AFL-CIO, and International Union of Painters and Allied Trades, District Council 15, filed responsive briefs.

Amicus Texas Business Association has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties and amici.

or members are customarily posted, to make clear that it encompasses posting through email and other electronic formats, where the respondent customarily communicates with employees or members by those means. Any issues as to whether electronic notice and which type of electronic notice is appropriate in a particular case should be resolved in compliance proceedings, in the same manner that issues regarding the number or location of paper postings are currently resolved. Further, in determining whether electronic posting is appropriate, the relevant inquiry should be whether the respondent customarily disseminates information to employees or members through electronic means.⁴

Respondent FSI, Respondent Arkema, and amici Chamber of Commerce (joined by Respondent J & R Flooring), Texas Business Association, and Bodman LLP, argue that electronic posting of remedial notices is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. They further argue that the General Counsel should bear the burden of establishing that electronic posting is warranted, and that any necessary factual showing should be made during the unfair labor practice hearing. The Respondents and supporting amici also contend that any change in the Board's standard notice posting remedy should be applied equally to respondent unions and respondent employers.⁵

IV. ANALYSIS

A.

The requirement that respondents post a notice informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the re-

spondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act. See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935), enf. denied in relevant part 91 F.2d 178 (3d Cir. 1937), revd., 303 U.S. 261 (1938). Remedial notices serve a number of important functions in advancing the Board's mission of enforcing employee rights and preventing unfair labor practices. They help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur. See generally *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399–401 (D.C. Cir. 1981). See also *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (purpose of remedial notice is to convey to employees information about their rights and the employer's obligation not to interfere with those rights); *Chet Monez Ford*, 241 NLRB 349, 351 (1979), enf. mem. 624 F.2d 193 (9th Cir. 1980) (notices are "a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices"). They also serve to deter future violations. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (the requirement to "conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices" is a "significant sanction"). In order to achieve these remedial goals, notices must be adequately communicated to the employees or members affected by the unfair labor practices found. The Board's standard notice posting provision therefore requires respondents to post a remedial notice for a period of 60 days "in conspicuous places including all places where notices to employees [members] are customarily posted."⁶ This provision has traditionally been applied to require posting of paper copies at fixed locations, usually on bulletin boards as well as at time clocks, department entrances, meeting hall entrances, and dues payment windows. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.2.

The ubiquity of paper notices and wall mounted bulletin boards, however, has gone the way of the telephone message pad and the interoffice envelope. While these traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if

⁴ Amicus AFL-CIO argues that the Board should go further and require that notices routinely be distributed to individual employees, read aloud, and translated into languages other than English at the request of a charging party or the General Counsel. These matters are beyond the scope of the issues on which briefing was invited. Accordingly, we do not address them in this case.

⁵ Respondent J & R Flooring also argues that the Board should disregard the Union's request for electronic posting in this case because: (1) the Union presented no argument in support of its exception; and (2) the Union waived its request for electronic posting by raising it for the first time in its exceptions to the Board. We find no merit in these arguments. It is well settled that the Board has the authority to consider remedial issues sua sponte. *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564 fn. 3 (2005) (citing *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996)).

Amicus National Right to Work Foundation takes no position on whether the Board should require electronic posting. However, it agrees with the Respondents and supporting amici that any change in the Board's policy concerning the posting of remedial notices should apply equally to respondent unions and employers.

⁶ Where the respondent is a union, the Board requires posting "where notices to employees *and members* are customarily posted." See *Operating Engineers Local 150*, 352 NLRB 360, 361 (2008) (emphasis added).

they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces,⁷ and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase.⁸ Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, “[t]oday’s workplace is becoming increasingly electronic.”⁹

Given the increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards, the continuing efficacy of the Board’s remedial notice is in jeopardy. Notices posted on traditional bulletin boards may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board. Furthermore, the growth of telecommuting and the decentralization of workspaces permitted by new technologies mean that an increasing number of employees will never see a paper notice posted at an employer’s facility.¹⁰ As a matter of general policy, it follows that, in addition to physical posting, notices should be posted electronically, on a respondent’s intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members.

⁷ For example, in a recent survey of nearly 900 employers in a wide variety of industries, email (83 percent of respondents) and intranet (75 percent) were the most frequently used communication methods for engaging employees and fostering productivity. By contrast, only 28 percent of the survey respondents frequently used posters or flyers for these purposes. *IABC Research Foundation & Buck Consultants, Employee Engagement Survey Results* (June 2010) (available at www.iabc.com/researchfoundation/pdf/IABCEmployeeEngagementReport2010Final.pdf). Similarly, a recent survey of professional employer organizations, which communicate on behalf of their clients with the clients’ employees, showed that 75.4 percent of the respondents used either entirely electronic distribution of human resources and benefits information or electronic distribution at least half of the time. Aon Consulting, *2010 PEO Survey: Communicating with Worksite Employees*, at 4 (available at www.aon.com/attachments/2010_PEO_Survey_Final.pdf).

⁸ See *Human Resources: Most Employers Use Intranets to Deliver HR Services, Watson Wyatt Study Finds*, Daily Labor Report No. 42, at A-5 (March 2, 2000). The Aon Consulting survey of professional employer organizations reported that 63.8 percent of the respondents planned to eliminate paper based communications at some time within the next five years. *2010 PEO Survey*, supra at 6.

⁹ Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. Kan. L. Rev. 1, 3 (2000).

¹⁰ See id. at 3 & fn. 13 (“A growing number of employees telecommute or otherwise report electronically, instead of reporting physically to a fixed location.”).

Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent.¹¹

Requiring electronic posting in these circumstances will improve the administration of the Act by ensuring that remedial notices are adequately communicated to the employees or members affected by the unfair labor practices. The fact that a respondent customarily uses electronic means of communication with its employees or members reflects a judgment concerning the relative efficacy of the available alternatives to communicate with the relevant audience. The Board’s remedial notices are sufficiently important to be communicated in the manner deemed appropriate by the respondent for its own communications. A respondent’s customary use of an electronic means of communication also demonstrates that use of the same means for communication of the Board’s notice does not entail an unreasonable burden for the respondent.

We believe that the Board’s current notice posting language, which requires posting in “conspicuous” places, including *all* places where notices to employees or members are customarily posted, is sufficiently broad to encompass new communication formats, including electronic distribution of remedial notices by email and/or posting on an intranet or the internet if a respondent customarily communicates with its employees or members by any of those means.¹² Nevertheless, to obviate any possible uncertainty about the meaning of that language, we shall modify the provision in pertinent part to add the following after the sentence ending “in all places where notices to employees are customarily posted.”

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means.

We agree with the General Counsel, the Charging Parties, and supporting amici, that questions as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. In determining, at the compliance stage, whether some form of electronic

¹¹ We agree with Respondents, supporting amici, and amicus National Right to Work Foundation that a policy concerning communication of remedial notices should apply equally to union and employer respondents. The policy we announce today, by its terms, applies to all respondents, employer and union, without differentiation.

¹² Cf. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1135 fn. 3 (1999) (finding electronic records to be encompassed by the Board’s traditional records preservation language); *Ferguson Electric Co.*, 335 NLRB 142, 142 fn. 3 (2001) (same).

posting is warranted, the relevant inquiry shall be whether the respondent employer customarily disseminates information to its employees via email and/or electronic posting. If the respondent is a union, the inquiry shall be whether the respondent customarily disseminates information to its members by email and/or electronic posting.

Addressing at the compliance stage whether a respondent customarily communicates with its employees or members electronically will permit respondents to present evidence about any peculiarities in their email, intranet, internet, or other electronic communication systems that would affect their ability to post remedial notices by those means. It is also consistent with the Board's current practice of resolving at the compliance stage issues regarding the location and number of paper postings. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.2. Accordingly, we hold that questions concerning whether a respondent customarily uses a particular electronic method in communicating with employees or members, whether electronic notice would be unduly burdensome, and other matters bearing on whether electronic notice is appropriate in a particular case, may be resolved at the compliance stage.¹³ *International Business Machines Corp.*, 339 NLRB 966 (2003), and *Nordstrom, Inc.*, 347 NLRB 294 (2006), are overruled to the extent they are inconsistent with this decision.

We adopt this approach today because we believe it is vital to preserving the efficacy of the Board's remedial notices as the use of electronic communications technology in the workplace and elsewhere proliferates. This approach constitutes an appropriate balancing of the parties' legitimate interests in light of technological change, and enables the Board to continue to protect and effectively enforce employees' rights under the Act. For the Board to ignore the revolution in communications technology that has reshaped our economy and society would be to abdicate our responsibility to "adapt the Act to changing patterns of industrial life."

B.

In reaching our decision, we have given careful consideration to the arguments of the parties and amici curiae. The Respondents and supporting amici—joined by our dissenting colleague—argue that electronic posting is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. We find no merit in these

arguments. Under our decision today, only respondents that customarily communicate with employees or members by electronic means will be required to post remedial notices electronically. Accordingly, our decision does not impose extraordinary or onerous burdens on respondents. Indeed, respondents who customarily communicate with employees or members electronically have chosen to do so because it is the most efficient and cost effective way to disseminate important information.¹⁴

Cases cited by the Respondents and supporting amici are not to the contrary. They hold that direct distribution of notices to individual employees by traditional mail and companywide distribution are extraordinary remedies.¹⁵ We are not persuaded, however, that electronic distribution is equivalent to traditional mail, companywide distribution, or other extraordinary notice remedies. By definition, in a company or union for which some form of electronic communication is customary, communication of a notice by that electronic means would be customary, not extraordinary. Moreover, distributing a notice electronically more closely resembles posting a notice on a paper bulletin board than traditional mail or companywide distribution. Most electronic communication systems will permit respondents to post or upload a single file containing the notice, similar to posting a single hard copy on a bulletin board, and most intranet and internet systems used for internal organizational communication will accommodate access limitations for user groups defined by the organization. Similarly, most email systems will permit respondents to send a single message to the employees or members affected by the unfair labor practices found, and to limit the scope of distribution to that group of individuals. We emphasize that it is not our intention to broaden the scope of the standard notice posting remedy. Rather, electronic no-

¹⁴ The Respondents and supporting amici also argue that it should remain the General Counsel's burden of proof to establish the propriety of such a remedy in each case. As explained above, the burden of establishing whether electronic notice of any particular type should or should not be required appropriately rests with the respondent because of its knowledge of its own communication practices and systems and its possession of the evidence concerning those facts.

¹⁵ See, e.g., *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2002) (special notice remedies, such as reading or mailing the notice to employees, are appropriate only in extraordinary circumstances where traditional posting is insufficient to dissipate the effects of the unfair labor practices found); *Carbonex Coal*, 262 NLRB 1306, 1306 (1982) (same); *Control Services, Inc.*, 314 NLRB 421, 421–422 (1994) (companywide notice posting is warranted in extraordinary circumstances, such as where the unfair labor practices were committed on a companywide basis); *Beverly Health & Rehabilitation Services*, 339 NLRB 1243, 1234–1244 (2003) (same); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (same), *enfd.* in relevant part 97 F.3d 65 (4th Cir. 1996).

¹³ See *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 448 fn. 2 (2005), *enf. denied* 453 F.3d 532 (D.C. Cir. 2006). Parties may also resolve the issue at the merits stage.

tices will have the same scope as notices posted by traditional means; that is, distribution will be limited, to the extent practicable, to the location(s) where the unfair labor practices occurred.

Respondent Arkema and amicus Texas Association of Business contend that, as a practical matter, it will be impossible to limit the scope of electronic notices to the affected facilities or locations, because of the ease with which such notices can be forwarded and disseminated. They further contend that such notices can be tampered with and altered as a tool to disrupt or defame respondents. Along the same lines, our dissenting colleague points out that respondents are required to sign remedial notices, and he cautions that respondents will “lose[] dominion” over such notices (and their signature) if they are posted electronically.

In reality, however, respondents have never had dominion over Board-ordered remedial notices. Remedial notices in Board proceedings are matters of public record. Hard copies, albeit unsigned, have long been available through the Board’s bound volumes. Electronic copies, also unsigned, have been available to the public since the inception of the internet through legal search engines and more recently the Board’s website. Signed copies, moreover, are routinely provided to charging parties upon request. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.4. Notices bearing the respondent’s signature could easily be scanned, altered, forwarded, or distributed by charging parties. Yet, despite the fact that remedial notices have long been in the public domain, respondents and supporting amici have cited no examples of improper use or dissemination. We see no reason to speculate that such improper use or dissemination will increase as a result of electronic posting. We will not, however, require a facsimile signature for notices posted or distributed by electronic means; an indication that the notice has been duly signed, such as “s/” and the name of the signing individual, will suffice for this purpose.

The Charging Parties contend that the Board should require respondent employers to allow employees to read electronic notices on paid work time. They also urge the Board to expressly forbid respondents from monitoring which employees open and read electronic notices and from taking adverse action against employees who forward, print, or download notices. The Charging Parties additionally urge the Board to require posting via email at least once per month during the posting period and to require posting for a period equal to the number of days that have elapsed from the first violation to the date of notice posting. We decline to adopt such rules at this time. With respect to concerns that employers may pro-

hibit employees from reading a remedial notice on paid work time, monitor which employees open and read notices, and/or take adverse action against employees who forward, print, or download notices, we caution that such conduct may violate Section 8(a)(1) (or Section 8(b)(1)(A) if the respondent is a union) if it tends to interfere with the exercise of Section 7 rights.

C.

The Board’s practice is to apply new policies and standards retroactively “to all pending cases in whatever stage,” *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)), unless application in a particular case would work a “manifest injustice.” *Id.* In determining whether retroactive application of the remedial policy we announce today would be unjust, we consider “the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.” *Id.* Because this case involves a remedial policy, and not a substantive rule of conduct, reliance on preexisting law is not an issue. Indeed, it is difficult to conceive of anything that any party might have done differently if this policy had been in effect prior to the events that gave rise to this case. To the extent that any injustice might be viewed as arising from application of the policy in this case, it is far outweighed by the need for the policy in order to maintain the efficacy of the Board’s notice remedy.

We will modify the Board’s original order in this case in conformity with this decision.

ORDER

The Board’s Order, reported at 355 NLRB No. 123 (2010), is modified as set forth below, and the Respondent, Flooring Solutions of Nevada, Inc., d/b/a FSI, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the actions specified in the Order as modified.

Substitute the following for paragraph 2(b).

“(b) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the attached notice marked “Appendix.”¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2007.”

Dated, Washington, D.C. October 22, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I dissent from my colleagues’ decision to expand the Board’s traditional notice posting remedy to include electronic posting. By their decision today, my colleagues transform what has heretofore been an extraordinary remedy into a routine remedy. Further, they have done so without considering practical implementation problems presented by the tremendous variation in the types of electronic media involved. Electronic posting is not a direct analog of physical posting. There are significant practical differences between the two, only a few of which are described below.

Initially, I readily acknowledge that the use of electronic media to communicate with employees in the modern workplace is common. I also note that many Federal agencies require or permit employers to use electronic media when giving employees periodic notice of statutory rights. On the other hand, I note that neither the General Counsel nor the majority refers to any Federal agency or court that regularly require the use of electronic communications *as a remedial matter*.

At present, once a respondent posts remedial notices in the appropriate physical locations its posting compliance

obligation is complete. Electronic posting, however, envisions a respondent being required to do more than this to effectuate compliance. Thus, a respondent would not only be required to “post” the notice on its intranet site, it presumably would face the additional obligation of communicating individually with employees via email to advise them of the posting on the intranet, or, in the alternative, of adding the posting as an attachment to an email. Aside from the merits of such individualized notifications and “invitations,” such a requirement is clearly beyond the current physical posting requirement; and, shares much in common with what are now considered to be “special” or “enhanced” notice mailing remedies. Thus, electronic posting would arguably require routinely imposing what has been heretofore considered to be a special remedy.¹

In addition, as a practical matter, a physical posting is designed to be viewed principally by employees at the location(s) where the unfair labor practices occurred. Thus, for example, a respondent that operates multiple sites is not typically required to post at sites other than where unfair practices took place. Indeed, this kind of posting is a “special” remedy, and reserved for use only in the instance of more egregious and pervasive unfair labor practices. Unless a respondent’s intranet is capable of limiting informational access and notification to select sites (a capability unclear as a general proposition) electronic posting would entail a posting obligation far broader than current practice and much more in line with current special remedies. Limiting intranet access to the notice by way of a link sent to certain individuals and/or locations (if possible) creates an additional burden on a respondent’s information technology personnel that goes far beyond what is required by the simple posting of a hard copy notice.

Moreover, under current procedures, a respondent retains physical control over the posting which it has executed. That is simply not true once an executed copy of the document is electronically “posted.” As a practical matter, the respondent loses dominion over such document which bears its signature. Once in cyberspace, the official Board notice is at much greater risk of being anonymously altered and broadly distributed to nonemployees, customers, stockholders, or competitors, or, in the case of union respondents to rival unions, and poten-

¹ The majority opinion equates the traditional notion of “where notices are customarily posted,” with the notion of “how employers customarily communicate with employees.” Those two things are not the same—if they were, reading the notice would be required in every case because the *most* customary means of communication is oral. However, under Board precedent a remedial notice reading requirement has been and continues to be a special remedy reserved for egregious unfair labor practices.

tial members, perverting the remedial purposes of the Act, and, become punitive.

It is unclear whether electronic posting requirements would include posting on internet or social networking sites for respondents who routinely use such means of communication. If so, and that is what some amici have requested, that would be the equivalent of requiring a respondent to publish a notice in a newspaper, heretofore an extraordinary and extremely rare remedy.

Furthermore, electronic posting imposes these additional obligations and sanctions only on respondents that happen to use compliant electronic media to communicate with employees about work matters. A respondent employer without such systems would avoid these enhanced posting remedies simply by happenstance. In an extreme example, one respondent could remedy a single 8(a)(1) interrogation finding by posting a notice at its time clock, while another respondent would have to remedy the same violation by additionally posting the notice on a nationwide intranet, with accompanying email. Further, while we lack factual information on the point, it seems quite possible that fewer respondent unions than respondent employers use electronic means of communicating with their members and employees affected by union unfair labor practices. There may be instances where the ability to communicate electronically is relevant to remedial action, but such ability should not, as a general proposition, be a basis for the arbitrary imposi-

tion of more onerous posting obligations on one set of respondents as opposed to others.

Finally, in my view, the details of electronic posting should not be deferred to the compliance process for determination on a case-by-case basis. Doing so invites more litigation and will serve to widen the temporal gap between a merit determination and the commencement of remediation. Moreover, by failing to specify how the new remedial posting requirement will be implemented for any of the myriad and varied methods of electronic communication with employees, the majority unnecessarily complicates the relative tasks of the General Counsel and administrative law judges in defining what a particular respondent's remedial obligations should be.

In sum, for all the reasons discussed above, I would not broaden the Board's traditional notice posting remedy to include routine electronic posting. I note that I would not oppose amending the traditional hard copy notice to include a link to the Board's official website where employees could read not only the notice, but the decision itself, from any location.

Dated, Washington, D.C. October 22, 2010

Briane E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD